



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-01-1

FACTS:

You are employed full time as a school counselor at a City's High School.^{1/} While holding that position, you were elected to the City Council and have continued to serve in both municipal positions in the City in compliance with G. L. c. 268A, §20.^{2/}

You anticipate that positions as a principal or assistant principal in the City's school system may become open. If one of these positions were to become open while you are serving as a City Councillor, you would like to apply for it and, if appointed, continue to serve as a City Councillor while also receiving a salary for your position as an assistant principal or principal in the City's school system.

School counselors are part of the same union collective bargaining unit as assistant principals and each position operates under the same collective bargaining agreement. If you were appointed an assistant principal, you would, however, receive a higher salary than your current school counselor's salary. By contrast, principals are not part of a union because they are considered managers in the school system. As a result, each principal has a separate contract with the school system.

You assert that the normal progression for school counselors or teachers is to move up to school administration. You compare this advancement to the promotion system for the Fire and Police departments, where, based on examinations, firefighters or officers move up the ranks to Sergeants or Lieutenants.

QUESTION:

May you, while serving as a City Councillor, relinquish your current paid position as a school counselor and accept a paid position as an assistant principal or principal in the City's school system under the "city councillor's exemption" to G. L. c. 268A, §20?

ANSWER:

No. For the reasons described below, §20 will prohibit you from being appointed and paid to become an assistant principal or principal while you are a City Councillor.

DISCUSSION:

As a school counselor, you are a municipal employee^{3/} under the conflict of interest law. When you later became a City Councillor, you also became a municipal employee in that capacity for purposes of the conflict of interest law. Because, as a City Councillor, you also have a financial interest in your contract with the City to serve as a school counselor, you must comply with G. L. c. 268A, §20, which prohibits you from having such a financial interest ^{4/} unless you qualify for one of the statutory exemptions. Section 20 imposes a broad prohibition against a municipal employee's having an additional "financial interest, directly or indirectly, in a

contract made by a municipal agency of the same city.” As we said in *EC-COI-99-2*, §20 “is intended to prevent a municipal employee from influencing the awarding of contracts by any municipal agency in a way which might be beneficial to the employee” and “is concerned with the . . . potential for impropriety as well as with actual improprieties.”^{5/}

As noted above, you have complied with the “city councillor’s exemption” in order to hold both positions. In pertinent part, this exemption states:

This section shall not prohibit an employee of a municipality with a city . . . council form of government from holding an elected office of councillor in such municipality, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office; provided, however, that no such councillor may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility; and provided, further, that *no councillor shall be eligible for appointment to such additional position while a member of said council* or for six months thereafter. Any violation of the provisions of this paragraph which has substantially influenced the action taken by a municipal agency in any matter shall be grounds for avoiding, rescinding or cancelling such action on such terms as the interest of the municipality and innocent third parties require. No such elected councillor shall receive compensation for more than one office or position held in a municipality, but shall have the right to choose which compensation he shall receive.^{6/}

Here, the issue is whether the phrase “no councillor shall be eligible for appointment to *such additional position*” prohibits you from becoming an assistant principal or principal while you continue to serve as a City Councillor.

(a) Statutory Language

We begin our analysis with the plain meaning of the statutory language of the restriction.^{7/} The exemption allows a compensated municipal employee also to become a city councillor, under certain conditions. However, the individual shall not be eligible for appointment to “such additional position.” The word “such” commonly means “of a kind or character about to be indicated, suggested or exemplified,”^{8/} or “previously characterized or specified.”^{9/} In this context, such must refer to a *municipal* position. The word “additional” plainly refers to something that is added.^{10/} Accordingly, the restriction appears, at a minimum, to prohibit you from holding a third paid municipal employee position, in addition to the school counselor and City Councillor positions.

Although the plain language prohibits adding a *third* municipal position in which the individual has a financial interest in a contract, it is unclear whether it is also meant to prohibit substituting the city councillor’s pre-existing municipal position for another position in which he has a financial interest in a contract, such as changing from school counselor to assistant principal or principal.^{11/} There is not necessarily only one antecedent term to the phrase “such additional position” in this exemption. Although we know “such” must refer to a municipal position, it could refer either to the antecedent phrase “employee of a municipality” or the phrase “elected *office* of councillor” or both positions. However, given that “such additional position” appears most closely after “no councillor,” it may be that the phrase is intended to refer to a position in addition to that of city councillor.

In any event, if “additional” means “existing by way of addition,” it is unclear whether the phrase “such additional position” should also include a municipal position that exists by way of

substitution for the prior municipal position. We have no doubt, however, that a change or a promotion from the school counselor position to an assistant principal's position or principal's position would constitute new positions in the school system. And either of these new positions would be in addition to your position of City Councillor.

(b) Legislative History

To help us understand the meaning of “such additional position” because its meaning is open to different interpretations, we may resort to the statute’s legislative history.^{12/} We also consider such factors as “the evil or mischief toward which the statute was apparently directed”,^{13/} the purpose of the legislation, in that “the purpose and not the letter of the statute controls”,^{14/} and the “fair import” of the statute.^{15/}

In 1999, the Legislature created the exemption for city councillors by amending the existing exemption for town councillors.^{16/} That exemption, when formerly available only to town councillors,^{17/} was patterned after another exemption to §20 for selectmen. The Legislature created this latter exemption, the “selectman’s exemption”,^{18/} in response to decisions by the Ethics Commission and the Superior Court which held that §20 prohibited current town employees from continuing to be paid in their primary municipal jobs while also serving as selectmen.^{19/} Similarly, the exemption for town councillors was enacted in response to opinions by the Commission.^{20/} Because the relevant language in the selectman’s exemption is identical to the language in the current city councillor’s exemption and the language first appeared when the Legislature added the selectman’s exemption to §20, we may look to the legislative history of the selectman’s exemption to determine the legislative intent of the phrase “such additional position.”^{21/}

As noted above, prior to the enactment of the selectman’s exemption, the Commission interpreted §20 to prohibit a selectman from continuing to receive compensation for serving in the municipal position he held prior to election. The Legislature and the Governor considered the fact that approximately twenty teachers, who were elected to boards of selectmen, would have to relinquish their teacher salaries or resign from their boards to comply with §20, unless the amendment that became St. 1982, c. 107 was enacted.^{22/}

The bill, as initially filed by its sponsor, Representative Cellucci, did not include the clause “and provided further that no member shall be eligible for appointment to such additional position while a member or for six months thereafter.”^{23/} Representative Cerasoli moved to amend the bill by adding that clause.^{24/} In response, the Executive Director of the Ethics Commission wrote to State Senator Fonseca noting, “This new language limits the dual relationships to selectman and some other position. It also guards against a selectman using his position to get himself the other job. For example, it would not prohibit a person who is already a teacher in a town from then becoming selectman. However, a selectman could not be appointed as a teacher while he served as selectman . . .”^{25/}

Notably, in explaining the legislation in his letter to the Governor, the sponsoring legislator stated, “1.) No such member may vote or act on any matter which is within the purview of the agency by which, he is employed or over which he has official responsibility, and 2.) No member shall be eligible for appointment to such additional position while a member or for six months thereafter. Thus, for example, a teacher can be elected and serve as a selectman in the town he teaches, but he cannot vote, on a matter which effects [sic] the school system, but a selectman who is not a teacher or other municipal employee cannot be appointed as a teacher

or other municipal employee during his [selectman's] term ..."^{26/} In sum, the selectman's exemption allows an elected selectman to retain his pre-existing municipal position.

Subsequent to the enactment of St. 1982, c. 107, the Commission was asked to consider whether the selectman's exemption" would prohibit a municipal employee, who was later elected selectman, from being re-appointed to his pre-existing municipal position. The Commission observed in *EC-COI-82-107*,

In response to this prohibition, the General Court considered proposals during the 1982 legislative session to allow dual status of selectman and employee. During the consideration of these proposals, the General Court was made aware of concerns over *potential abuses in the dual status arrangement in particular where selectmen could potentially acquire other municipal positions by virtue of their incumbency in the office of selectman.*^{27/ 28/} In response to this concern, the General Court adopted an amendment to House Doc. No. 1657 which prohibited selectmen from eligibility for appointment to an additional municipal position.^{29/} This amendment was retained in the final language amending §20 which was approved by the Governor as St. 1982, c. 107.

In view of the legislative history, we concluded that the scope of the restriction "was intended to cover only new, post-elective appointments to municipal positions and was not intended to prohibit municipal employees from eligibility for reappointment to positions held immediately prior to their election as selectmen."^{30/} We also concluded that "to construe §20 so that selectmen could not be eligible for reappointment for positions held prior to election would, in effect, nullify the legislative purpose in enacting St. 1982, c. 107, and would be inconsistent with the Commission's obligation to give G. L. c. 268A a workable meaning."

However, we have not, until now, addressed the issue of whether the selectman's exemption or its subsequent analogues would prohibit an incumbent selectman, town councillor, or city councillor, as the case may be, from being promoted from his first municipal employee position to another position within the same municipal agency.

Here, the positions of assistant principal and principal are different from the position of school counselor. Although you would not be gaining an "additional position" by adding a *third* job, which the city councillor's exemption plainly prohibits, you would be substituting the new position of assistant principal or principal for your current position of school counselor. Unlike the circumstances in *EC-COI-82-107*, you would not be reappointed to the same position but, rather, appointed to a new position. Like any new municipal position, you would have to compete for it, rather than be promoted to it *only* by virtue of your current position.

Mindful that we are obligated to narrowly construe exemptions to the conflict law's prohibitions,^{31/} we believe that the plain language and the policy behind the city councillor's exemption, like the selectman's exemption, is to prevent a councillor "from influencing the awarding of contracts by any municipal agency in a way which might be beneficial to"^{32/} the city councillor. Although the Legislature narrowed §20's general restriction by adding the selectman's, town councillor's, and city councillor's exemptions, it ultimately approved the narrower of the proposed exemptions. Thus, it remained concerned about municipal officials, particularly at the highest levels of their respective municipal governments, being able to acquire financial interests in "*other municipal positions by virtue of their incumbency.*"^{33/} It would undercut the Legislature's intent to allow you, while you are a city councillor, to be promoted from your current municipal position to a different municipal position, either of which would constitute your having a financial interest in a contract for purposes of §20. To conclude

otherwise would allow a city councillor to “leverage” the city councillor’s exemption to change his pre-existing municipal contract position for better contract positions in city government.

In light of the legislative intent of §20, we are not inclined to extend our conclusion in *EC-COI-82-107* to an appointment to a new position. Accordingly, we conclude that while you have a financial interest in your contract to serve as a school counselor, §20 prohibits you from being eligible for appointment to a principal or assistant principal’s position in the City’s school system while you are also a member of the City Council or for six months thereafter.^{34/}

DATE AUTHORIZED: April 10, 2001

^{1/}The background to your request is based on information you and the City Solicitor provided.

^{2/}G. L. c. 268A, §20, para. 4.

^{3/}“Municipal employee, a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, . . .” G. L. c. 268A, §1(g).

^{4/}“A municipal employee who has a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the city or town is an interested party of which financial interest he has knowledge or has reason to know, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.” G. L. c. 268A, §20(a).

^{5/}*Quoting, Quinn v. State Ethics Commission*, 401 Mass. 210, 214 (1987) (holding that §7, the state counterpart to §20, prohibited a state employee from having an interest in his additional contract as a bail commissioner). For an incumbent city councillor who holds no other municipal positions but who wishes to add an appointed paid job with his city or have any other financial interest in a city contract in addition to serving on the city council, only one exemption is available. That exemption, §20(b), imposes significant obstacles to having a financial interest in a municipal contract, evidencing the Legislature’s general intent to make it difficult for a city councillor also to hold other jobs in his city.

^{6/}G. L. c. 268A, §20, para. 4. (emphasis added).

^{7/}*Int’l Organization of Masters, etc. v. Woods Hole, Martha’s Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984) (“The intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill.”)

^{8/}*Webster’s Third New International Dictionary* (1993). See e.g., *Brisk Waterproofing Co., Inc. v. Director of the Division of Building Construction*, 338 Mass. 784, 785 (1958) (in G. L. c. 149, §44D, which provides that “the awarding authority shall reserve the right to reject any sub-bid . . . if it determines that such sub-bid does not represent the sub-bid of a person competent to perform the work . . .,” the word “such” obviously refers to a “sub-bid of a person competent to perform the work.”)

^{9/}*Id.* See also *Black’s Law Dictionary* (Fifth Ed.). “Of that kind, having particular quality or character specified. Identical with, being the same as what has been mentioned. “like, similar, of the like kind. ‘Such’ represents the object as already particularized in terms which are not mentioned, and is a descriptive and relative word, referring to the last antecedent.”

^{10/}“Addition” means “the result of adding: anything added” and “additional” means “existing or coming by way of addition.” *Webster’s Third New International Dictionary* (1993). See e.g., *Town of Burlington v. Dept. Of Educ. Com. of Mass.*, 736 F.2d 773, 790 (1st Cir. 1984) (construing “additional” in the ordinary sense of the word, “additional evidence” means supplemental evidence, thus the clause “additional evidence” in 20 U.S.C. §1415(e)(2), which requires the court to receive the records of administrative proceedings and hear additional evidence at the request of a party, does not authorize witnesses at trial to repeat or embellish their prior administrative hearing testimony—this would be inconsistent with the usual meaning of “additional”); *Chambers I-93 v. Mercedes-Benz of North America*, 911 F. Supp. 34, 35 (D. Mass. 1995) (under G. L. c. 93B, which prohibits a manufacturer from “arbitrarily and without

notice to existing franchisees . . .” entering into an agreement “with an additional franchisee,” the phrase “additional franchisee” includes only a new franchisee, rather than the sale and relocation of an existing automobile dealership).

^{11/}You argue that the phrase “such additional position” is not meant to include what amounts to advancement to other jobs within the same career path. Here, you would like to advance in the school system’s hierarchy to assistant principal or principal. Moreover, if appointed to one of those positions, you would not continue to serve as a school counselor because you would be promoted to a new position. As a result, you believe that you would not be adding a third position to your current two municipal positions, which, you argue, is what the exemption intends to prohibit. You also contend that if your promotion were considered to be an “additional position,” §20 would stifle promotional advancement and opportunity by making a sitting City Councillor ineligible for such a promotion.

^{12/}*Treasurer & Receiver Gen. v. John Hancock Mut. Life Ins. Co.*, 388 Mass. 410, 423 (1983).

^{3/}*Meunier’s Case*, 319 Mass. 421, 423 (1946).

^{14/}*Walsh v. Ogorzalek*, 372 Mass. 271, 274 (1977).

^{15/}*Thatcher v. Secretary of Commonwealth*, 250 Mass. 188, 191 (1924).

^{16/}The words “city or” were inserted by *St. 1999, c. 7*. This act, entitled “An Act allowing certain municipal employees to serve as city councillors,” also amended G. L. c. 39, §6A and G. L. c. 43, §17A. We offer no opinion about whether your seeking appointment as principal or assistant principal would be restricted under those General Laws.

^{17/}*St. 1985, c. 252, §3*.

^{18/} “This section shall not prohibit an employee or an official of a town from holding the position of selectman in such town nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office; provided, however, that such selectman shall not, except as hereinafter provided, receive compensation for more than one office or position held in a town, but shall have the right to choose which compensation he shall receive; provided, further, that no such selectman may vote or act on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility; and, provided further, that no such selectman shall be eligible for appointment to any such additional position while he is still a member of the board of selectmen or for six months thereafter. Any violation of the provisions of this paragraph which has substantially influenced the action taken by any municipal agency in any matter shall be grounds for avoiding, rescinding or cancelling the action on such terms as the interest of the municipality and innocent third parties may require.”

^{19/}*St. 1982, c. 107 as amended by St. 1984, c. 459; EC-COI-93-4*. In *EC-COI-82-107*, we observed that *St. 1982, c. 107* was enacted in response to the following two decisions. *EC-COI-80-89* concluded that §20 prohibited a selectman from being compensated to teach in his town’s school system. *Walsh v. Love*, Norfolk Superior Court Civil Action No. 132687 (July 2, 1981) held also that being paid to be a teacher while also serving as a selectman in the same town violated §20.

^{20/}See *e.g., EC-COI-83-38* (Commission concluded that the selectman’s exemption was not available to town councillors but noted that bills were then pending in the legislature to expand the exemption).

^{21/}“Sound principles of statutory construction dictate that interpretation of provisions having identical language be uniform” *Webster v. Board of Appeals of Reading*, 349 Mass. 17, 19 (1965).

^{22/}See letter to Governor King, dated May 26, 1982 from Rep. Cellucci.

^{23/}See House Doc. No. 1657 [January 1982].

^{24/}See House Doc. No. 5877 [March 15, 1982]

^{25/}Letter dated March 25, 1982 from Maureen McGee, Executive Director of the Ethics Commission to State Senator Fonseca.

^{26/}See letters to Governor King, dated May 26, 1982 from Rep. Cellucci and May 27, 1982 from Rep. Flood. See *a/so* letter dated March 25, 1982 from the Executive Director of the Ethics Commission to Senator Fonseca.

^{27/}Emphasis added.

²⁸/See e.g., letter dated March 25, 1982 from Maureen McGee, Executive Director of the Ethics Commission to State Senator Fonseca (describes in detail the general purpose of §20, the concerns about prohibiting teachers from serving as selectmen, and the need to provide an exemption for them without allowing “the very kind of ‘double-dipping’ that Section 20 is meant to prohibit.”

²⁹/See House Doc. No. 5877 [March 15, 1982].

³⁰/Emphasis added. We observed in *EC-COI-82-107* that the title of St. 1982, c. 107, “An act providing that a person shall not be prohibited from holding the office of selectman in a town because such person is an employee of the Town,” reflects an intent to allow incumbent municipal employees also to serve as selectmen while continuing their prior municipal employment.

³¹/See *Department of Environmental Quality Engineering v. Town of Hingham*, 15 Mass. App. Ct. 409, 412 (1983).

³²/See note 5, *supra*.

³³/*EC-COI-82-107* (emphasis added).

³⁴/Although we concluded in *EC-COI-99-2* that a city councillor, who held no other municipal position prior to his election, may be able to qualify for an exemption under §20(b) to have a financial interest in a contract with his city's school system under certain circumstances, it does not appear that you would be able to qualify for that exemption if you were to resign your position as a school counselor prior to being eligible for appointment to assistant principal or principal. Among other requirements, as noted above, §20(b) requires that, under a contract for personal services, the employee must not receive compensation for more than 500 hours during a calendar year. A contract to serve as assistant principal or principal would require well in excess of 500 hours during a year.